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UNITED STATES DISTRICT COURT, WESTERN DISTRICT
OF VIRGINIA.

IN RE ALLEN & COMPANY, BANKRUPTS.*

December 22, 1904.

1. BANKRUPTCY COURT.—A court of bankruptcy is a court of equity seeking to administer the law according to its spirit, and not merely by its letter.
2. HOMESTEAD EXEMPTION—*Sec. 191 of the Constitution of Va.—Fraudulent conveyances.* In sec. 191 of the Constitution of Virginia, providing that the homestead “exemptions shall not be claimed or held . . . in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration,” the language “has been set aside on the ground of fraud or want of consideration” must of necessity refer to an adjudication of a court. The language “shall not be claimed or held” seems to mean “shall not be effectually claimed.” The court cannot disregard the word “claim” and read the clause as if written “shall not be held in any property a conveyance of which has been set aside.”
3. FRAUDULENT CONVEYANCES—*Reconveyance and claim of homestead.* Where there has been a fraudulent conveyance by a head of a family, a reconveyance and claim of homestead made prior to the decree setting aside the fraudulent conveyance is sufficient to make the claim a valid one.
4. FRAUDULENT CONVEYANCES—*Inchoate lien.* The mere fact that the creditors in a case have obtained an inchoate lien prior to the conveyance and claim of homestead is not sufficient.
5. CONSTRUCTION OF STATUTES—*Intent of the law-makers.* While the intent of the law-maker should be given full effect by the courts, still the supposed intent must be either expressed or fairly inferable from the words used.
6. CONSTRUCTION OF STATUTES—*Expressio unius.* Under the principle *expressio unius*, a provision which is expressly applicable to one state of facts is not to be applied to another.

Upon a petition for a review of a ruling of a referee in bankruptcy, refusing to allow bankrupt's claim of homestead exemption.

The opinion states the case.

R. L. Gardner, for creditors.

F. W. Morton, for bankrupt.

McDOWELL, District Judge:

On April 7, 1904, one W. C. Allen filed a voluntary petition in bankruptcy, alleging that he and one J. A. Allen had been partners

*Reported by George C. Gregory.

in business, under the firm name of W. C. Allen & Co., with which were filed schedules of the liabilities and assets of the firm and of said W. C. Allen. The petition prayed that the firm be adjudicated a bankrupt; but did not pray that W. C. Allen be so adjudicated.

An opinion sent to counsel for W. C. Allen, April 9, 1904, reads in part:

"This petition, which is filed by W. C. Allen, one of two partners composing the firm of W. C. Allen & Company, prays that the firm be adjudicated a bankrupt. J. A. Allen, the other partner, is not a party to the petition, and the petition does not contain the allegations necessary to make it proper to adjudicate the firm an involuntary bankrupt. I think it would be clearly improper to adjudicate the firm a bankrupt under this petition.

Except for the fact that the petition does not pray that W. C. Allen be adjudicated a bankrupt, it is perhaps sufficient in its statements to authorize such an adjudication. However, the petition is as above stated informal, and for fear I should misunderstand the desire of the petitioner, I think it best that the petition be dismissed, without prejudice to the rights of the petitioner."

And because of the doubt therein expressed an order was entered on April 9, 1904, dismissing the petition without prejudice.

On April 16, 1904 (J. A. Allen having in the meantime filed a petition and schedules, and as it was made to appear that the partners wanted the firm and themselves as to the firm debts adjudicated bankrupts), an order was entered, setting aside the order of April 9th, and adjudicating the firm and both members thereof, as to the firm debts, bankrupts.

In the schedules filed with the petition of W. C. Allen is a claim of homestead in the land and personal property now in dispute, which is of less value than \$2,000, the amount allowed in this state, and is described as having been conveyed by W. C. Allen *et ux* to one W. J. Allen, and reconveyed by W. J. Allen to said W. C. Allen. A proper deed of homestead was executed by W. C. Allen and admitted to record on April 6th, 1904. The deed from W. C. Allen *et ux* to W. J. Allen was made January 9, 1904, and the reconveyance was made April 2d, and admitted to record April 6th, 1904.

Proceeding under sec. 2460, Pollard's Code of Virginia, certain of the creditors of W. C. Allen & Co. instituted a suit in chancery on February 13th, 1904, in the Circuit Court of Pulaski county to have the deed made by W. C. Allen *et ux* to W. J. Allen set aside for fraud and want of consideration, and the property therein conveyed subjected to the claims of the said creditors. Later sundry other creditors filed petitions as authorized by said section of the

Code. Commencing February 13th, memoranda of *lis pendens* were filed and docketed in the proper clerk's office. So far as appears no defense of any sort has been set up by Allen, no evidence has been taken and no decree has been rendered by the state court. While no stay order has been made by this court, the parties have apparently tacitly agreed not to move in the state court until some order is made in this court touching the question here raised.

At the first meeting of creditors held before the referee in bankruptcy on May 14, 1904, sundry claims were filed and proved, and objections to W. C. Allen's claim of homestead were filed with the referee in behalf of the creditors suing in the state court. This paper is endorsed "Grounds of Defense." No trustee was appointed by the creditors, and the referee entered upon an examination of W. C. Allen and other witnesses in regard to the right of Allen to have his homestead allowed. Finally, by order of August 10, 1904, the referee ruled that the objections to the claim of homestead be sustained, appointed a trustee and directed him, after having given bond, to take charge of all the property in question and to sell it for the benefit of the creditors.

It is contemplated by sec. 47, sub-sec. 11 of the bankrupt act, and by General Order XVII, that the trustee shall set apart the exemptions and make report of his actions; and that thereafter the creditors will file exceptions, if they wish, to such report. Such is undoubtedly the regular and orderly method of raising such question as is here sought to be raised. But, as was said in *Kane's Case*, 127 Fed. 552-3, "A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit and not merely by its letter." In the case at bar, if I correctly understand the facts, there are no assets, if the property claimed as exempt be held to be such, and there was no reason for the appointment of a trustee, if the claim of homestead was to be allowed. I think therefore that the informality of objecting to the claim of homestead prior to the appointment of a trustee, need not necessarily prevent an adjudication of the question presented to the referee.

In the Virginia Constitution of 1902 is a new provision, which has, so far as I am advised, never been construed by any Virginia court. The provision (sec. 191) reads:

"The said [homestead] exemption shall not be claimed or held in a shifting stock of merchandise, or in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."

Under the Constitution of 1869, there were several adjudications of the Court of Appeals of Virginia giving a debtor the right to claim and have his homestead in property which he had fraudulently conveyed. In order to get a clear idea of the state of the law at the time the new Constitution was drafted, and of the change intended to be made thereby, these decisions should be considered. In *Boynton v. McNeal*, 31 Gratt. 456; *Marshall v. Sears*, 79 Va. 49, and *Hatcher v. Crewe*, 83 Va. 371, the debtor, after a decree holding that a conveyance (or bill of sale) made by him was void for fraud, claimed for the first time and was allowed his homestead exemption in the property attempted to be conveyed. The reasoning of the court in the *Boynton Case* may be briefly summarized as follows: The homestead is for the benefit of the debtor's wife and children and it is not right that they should be made to suffer for the wrongful act of the debtor. Again, the fraudulent conveyance being void as to creditors, it stands as to them as though it had never been made. See 31 Gratt., pp. 459, 462.

In *Shipe v. Repass*, 28 Gratt. 716, Hurt, who had conveyed land to his son, filed a homestead deed, whereby he claimed a homestead in the purchase money notes executed by the son. Subsequently the deed from Hurt to his son was adjudged fraudulent and void. And the court allowed Hurt a homestead in the land. In *Mahoney v. James*, 94 Va. 176, a debtor took out life insurance payable to his wife and child, and until his death paid the premiums thereon. After the debtor's death the insurance money was paid to the widow and child. Thereafter creditors of the deceased husband sued the wife and child, claiming a sum at least equal to the premiums paid by the husband, on the ground that such premium payments were in effect voluntary and fraudulent gifts to the wife and child. Prior to suit the widow and child filed a homestead deed claiming the insurance money, and in their answer to the bill they asserted their right of homestead. On the assumption that the husband had in paying the premiums defrauded his creditors, the court held the widow and child entitled to the insurance money as a homestead. In *Oppenheim v. Myers*, 99 Va. 582, 7 Va. Law Reg. 275, Mrs. Oppenheim, being indebted and insolvent, conveyed an interest in certain real estate to her husband. Thereafter her creditors filed suit attacking this deed as fraudulent. Just before a decree was rendered, holding the conveyance void for fraud, Oppenheim and wife

filed a joint homestead deed claiming said interest in said land as their "joint and several homestead." They then filed a petition in the above mentioned suit claiming the homestead. The trial court held the conveyance from Mrs. Oppenheim to her husband void and referred the cause to a commissioner. Before further action by the court, Oppenheim died. Thereupon Mrs. Oppenheim (not filing any new homestead deed) filed an amended petition claiming the same homestead for herself and infant children. The creditors claimed, as the statute gave them a lien from the time of filing their bill, which was before Mrs. Oppenheim became a widow and before she had a right to claim a homestead, that they had a right in the land paramount to her claim of homestead. The trial court sustained the contention of the creditors; but the court of appeals reversed this decision.

The language of the present Constitution—"has been set aside on the ground of fraud or want of consideration"—must of necessity refer to an adjudication of a court. The language "shall not be claimed or held," seems to me to mean—"shall not be effectually claimed." We can not disregard the word "claim" and read the cause as if written—"shall not be held in property a conveyance of which has been set aside." Even if the clause could be so read there are reasons for doubting if the creditors' contention in this case could be sustained; but it is useless to discuss the question on this supposition. We must deal with the law as it is written, and we cannot suppress the word "claim" if we would arrive at the true intent. The claim of homestead in the case at bar was made prior to any adjudication, and I am unable to avoid the conclusion that, where there has been a fraudulent conveyance by a head of a family, a reconveyance and claim of homestead made prior to a decree setting aside the fraudulent conveyance is sufficient to make the claim a valid one.

Under the language used by the convention no court, having jurisdiction to allow a claim of homestead, can properly decline so to do unless a fraudulent conveyance of such property *has been* set aside at the time the claim is asserted.

The mere fact that the creditors in the case at bar obtained an inchoate lien prior to the reconveyance and claim of homestead is not sufficient. Under the first three decisions above mentioned the householder could validly claim his homestead after a decree had

been rendered setting aside for fraud a conveyance, and the lien obtained by his creditors prior to such claim was held of no avail. The new Constitution is so expressed as to change this rule only to the extent that a claim of exemption made after such decree shall be unavailing. To argue that the inchoate lien gives the creditors a right superior to the claim of homestead made prior to a decree converting the inchoate lien into a perfected right, not only assumes that an inchoate lien is a perfected right, but seems to beg the question. The very point at issue is whether or not the new law authorizes the court to so decree as to convert the creditors' inchoate lien into a perfected right when the claim of homestead is asserted before such decree is rendered. So also as to the argument that by a reconveyance made after suit filed by the creditors the claimant takes the property *cum onere*. He does take it subject to the rights given the creditors by sec. 191; but what are those rights? The language used most plainly denies the homestead only where the decree annulling a conveyance precedes the reconveyance and claim of homestead. And an intent to invalidate the claim of homestead under the circumstances here does not seem to me to be shown. While the intent of the law maker should be given full effect by the courts, still the supposed intent must be either expressed or fairly inferable from the words used. And under the principle *expressio unius*, a provision which is expressly applicable to only one state of fact is not to be applied to another.

If the intent which the creditors contend for had existed, I think sec. 191 of the Constitution would have read somewhat in this wise: "The homestead exemption shall not be claimed or held in any property which has been fraudulently conveyed by the homestead claimant." Thus expressed the fraudulent conveyance would, when judicially ascertained, prevent an exemption of the homestead whether the property were reconveyed before or after suit by creditors; and whether the claim were made before or after decree.

It is true that the rather simple device of securing from the fraudulent grantee a reconveyance, and making a claim of homestead, prior to an adjudication, leaves the householder in the position he was in under the former Constitution. But it seems fairly to be inferred that the convention had no intention, even if the possibility of such action on the part of the homestead claimant was contemplated, of preventing such a result.

No very good reason suggests itself why a householder and head of a family, who owns no property in excess of \$2,000, should be denied a homestead—which is for the benefit of his family—merely because he has made a fraudulent conveyance of such property; provided his creditors are not thereby injured. I shall consider now only general creditors and leave out of view those who have taken homestead waiver obligations and those whose claims are within the exceptions mentioned in sec. 190 of the present Constitution. As to these latter creditors the reconveyance and claim of homestead could be of no service to the debtor and could do no harm to the creditor. Thus confining the discussion, let us first consider the case of a householder whose entire estate is of less value than \$2,000. Except in view of a fact to be mentioned later no such householder can injure the creditors we have in view by making a fraudulent conveyance of his estate. His entire estate can be shielded by simply filing a homestead deed. Such creditors of such a debtor had no right to anticipate, when giving him credit, that they could ever subject the property. And if such debtor should make a fraudulent conveyance of his property, and should thereafter, under compulsion of a creditors' suit to set aside such conveyance, secure a reconveyance and file a homestead deed, his creditors are in no worse position than that which they must have contemplated when they extended credit.

The fact, adverted to above, which would afford to a knavish householder circumstanced as above a reason for making a fraudulent conveyance of his estate to some member of his family or some friend, is that by so doing he might be enabled to secure a homestead in future acquired property, and thus in effect shield more than \$2,000 worth of property. But when the householder is forced to secure a reconveyance of, and to claim his homestead in, the fraudulently conveyed property, he is cut off from consummating **any** such dishonest purpose. And it may be here said that if my views are sound, although a defense to such creditors' suit setting up the reconveyance and claim of homestead would prevent subjecting the property to the creditors' claims, the costs of suit would nevertheless be properly adjudged to the creditors. This in theory is compensation for the expense to which the creditors have gone in bringing their suit.

The case of a householder whose estate is worth more than \$2,000

needs very little discussion. If he, by pleading a reconveyance and claim of homestead in fraudulently conveyed property, succeeds in preventing a loss of his homestead, he can not thereby prevent his creditors from subjecting the remainder of his estate. And hence in this case also the creditors of the class under discussion secure all that they had a right to expect when extending credit—*i. e.* satisfaction out of the debtor's non-exempt estate.

It is at least probable that the convention did not contemplate such a state of affairs as we have in the case at bar. A householder having an estate over \$2,000 in value would do no harm to his creditors by taking a reconveyance and asserting his right of homestead in fraudulently conveyed property. A householder whose estate is worth less than \$2,000 would rarely seek to shield it from non-waiver creditors by the silly device of fraudulently conveying it (unless to secure thereby more than \$2,000 exemption—and this intent is checked by the law as above construed). Hence it may be that the convention did not contemplate such a transaction. But if so, there is every reason for refusing to strain the language used in the Constitution to make it apply to an un contemplated and unprovided for state of affairs.

Nor can it be said that this construction leaves the law as it was under the former Constitution, and that it practically gives no effect to the new provision found in sec. 191. In fact a wise and valuable change has been made in the law. It is an old rule, nowhere better established than in this state, that he who charges fraud must clearly prove it. Under the old law the creditors who attacked a conveyance as fraudulent had usually a difficult and expensive task to sustain the burden of proof resting on them. The debtor could well afford to, and had every inducement to, resist the creditors until the final decree was rendered; for he could thereafter, if the decree were adverse to him, effectually claim his homestead. Under the present Constitution, as above construed, the debtor who has in fact made a fraudulent conveyance not only imperils his exemption by contesting the claim of his creditors until decree; but he is put under strong inducement to lighten the task of his creditors, to annul the fraud, so to speak, by securing a reconveyance, and thus save his homestead. Here surely is a change from the old rule, and one that is beneficial to the creditors and at the same time not an undue punishment of the innocent family of the fraudulent debtor.

It follows that the ruling of the referee must be reversed, and the bankrupt's claim of exemption allowed. I am further of opinion that the litigation in the state court should be (pending action on application for discharge) stayed, except as to such creditors—if any—as hold homestead waiver obligations binding the social assets of W. C. Allen. If there are any such creditors they should be allowed to subject the exempt property, and, if it be necessary, the proceeding in this court can be stayed until they have had opportunity to do so. *Lockwood v. Exchange Bank*, 190 U. S. 294; *In re Brumbaugh*, 128 Fed. 971.